Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(f)-3–02 OF 2018 AND 01(f)-5–02 OF 2018
ZAHARAH IBRAHIM CJ (MALAYA), RAMLY ALI, AZAHAR MOHAMED, BALIA YUSOF AND ROHANA YUSUF FCJJ
31 JULY 2019

Civil Procedure — Appeal — Jurisdiction — Appeal against Court of Appeal — Whether order of High Court illegal order made in excess of jurisdiction and liable to be set aside — Whether party seeking to challenge sealed and perfected court order which had not been appealed upon was required to take active step in filing application to set aside court order — Whether defendants could challenge order of High Court by raising it in defence — National Land Code (Penang and Malacca Titles) Act 1963 ss 15, 27(3), 29(1)

Tenaga Nasional Bhd ('the first defendant') occupied a reclaimed land adjacent to the land ('Lot 78') owned by the appellant ('the plaintiff'). The Collector of Land Revenue Butterworth had determined and set out the boundary of Lot 78 in accordance with traverse mark ('TM') method. According to the plaintiff, the TM method had resulted in a loss of land area of the plaintiff as opposed to measurement following high water mark ('HWM'). The plaintiff claimed it would obtain an additional estimated area of 7.5 acres ('the disputed land') if HMW method was to be employed. The plaintiff applied to the Director of Land Titles to redetermine the measurement of Lot 78 but the Deputy Director of Titles, Pulau Pinang ('the deputy director') affirmed the decision of the collector ('the first decision'). The plaintiff then appealed to the Land Titles Appeal Board ('the appeal board') but it was dismissed, on the basis that the first decision was a final decision under s 27(3) and s 28(3) of the National Land Code (Penang and Malacca Titles) Act 1963 ('the Act') thus not appealable under s 15 of the Act. The plaintiff then filed an appeal against the decision of the Appeal Board to the High Court. The High Court remitted the matter to the District Commissioner of Land Titles for it to be determined ('the 1995 order'). No appeal was lodged by any of the parties against the 1995 order. Instead, the deputy director complied with the 1995 order and after an enquiry, decided and measured the boundary of Lot 78 in accordance with HWM ('the second decision'). It resulted in the disputed land forming part of Lot 78. Meanwhile, the first defendant continued to occupy the reclaimed land applied for alienation of a portion of the reclaimed land. The first defendant queried on the status of the disputed land and it was responded by the officer of Pengarah Tanah dan Galian Negeri Pulau Pinang ('the third defendant') that the first decision was the correct decision and not the second decision. In its

claim, the plaintiff sought for various declarations and orders, inter alia, that the second decision would have to be complied by the defendants and the first defendant to vacate the disputed land. The learned judicial commissioner held that: (a) the 1995 order was a valid order of the High Court, and ipso facto the second decision of the Deputy Director of Land Titles was a good decision; and (b) the second decision was final and conclusive and it had indeed superseded the first decision. Two separate appeals were lodged before the Court of Appeal on the decision of the High Court. One by the first defendant and the other by the second and the third defendants. The Court of Appeal allowed the appeals against the plaintiff and set aside the decision of the High Court. Hence, these two appeals by the plaintiff.

Held, allowing the appeal, setting aside the order of the Court of Appeal and affirming the order of the High Court:

(1) The defendants bore the burden of proving that the appeal before the High Court was not on question of law but merely on facts. The learned trial judge was correct in imposing the burden on the defendants to prove that the appeal was wrongly brought by the plaintiff. It was the findings of the High Court that the defendants had failed to adduce evidence in support of their contentions. The conclusion of the Court of Appeal that it was made on questions of facts was not supported by evidential proof (see para 29).

(2) Section 19 of the Act was not an exclusion clause, instead it conferred the High Court with appellate jurisdiction. An error of fact or law, at worst was only equivalent to a wrongful exercise of power. Therefore, it was not a case where the High Court lacked jurisdiction to hear any appeal. The High Court could not be precluded from issuing the 1995 order. An inherent jurisdiction may not be excluded even by statute. Far from excluding any jurisdiction, s 19 of the Act in essence empowered appeal to be made, albeit on question of law. Thus, by its inherent jurisdiction the 1995 order was legally issued (see paras 33 & 40).

(3) The High Court was not in clear breach of any statute and was not in excess of jurisdiction in issuing the 1995 order. Hence the 1995 order was not a nullity. Consequently, the second decision was therefore, valid and enforceable (see para 51).

(4) The defendants should not be allowed to impugn the 1995 order. The defendants sat on the 1995 order which they believed to be a nullity for a span of 15 over years, only to raise it as a defence to an action of trespass. If this was allowed, floodgates would be opened to a never-ending litigation (see para 58).

[Bahasa Malaysia summary

Tenaga Nasional Bhd ('defendan pertama') menduduki tanah yang dituntut balik yang bersebelahan dengan tanah ('Lot 78') yang dimiliki oleh perayu ('plaintif'). Pemungut Hasil Tanah Butterworth telah menentukan dan menetapkan sempadan Lot 78 mengikut kaedah *traverse mark* ('TM'). Menurut plaintif, kaedah TM telah mengakibatkan kehilangan kawasan tanah plaintif berbanding dengan pengukuran mengikut tikas air pasang ('HWM'). Plaintif mendakwa ia akan memperoleh keluasan tambahan sebanyak 7.5 ekar ('tanah yang dipertikaikan') jika kaedah HWM digunakan. Plaintif memohon kepada Pengarah Hakmilik Tanah untuk merangka semula pengukuran Lot 78 tetapi Timbalan Pengarah Hakmilik, Pulau Pinang ('timbalan pengarah') mengesahkan keputusan pemungut ('keputusan pertama'). Plaintif kemudiannya merayu kepada Lembaga Rayuan Hakmilik Tanah ('Lembaga Rayuan') tetapi ditolak, atas dasar bahawa keputusan pertama adalah keputusan muktamad di bawah ss 27(3) dan 28(3) Kanun Tanah Negara (Hakmilik Pulau Pinang dan Melaka) 1963 ('Akta') tidak boleh dirayu di bawah s 15 Akta. Plaintif kemudian memfailkan rayuan terhadap keputusan Lembaga Rayuan ke Mahkamah Tinggi. Mahkamah Tinggi mengembalikan perkara itu kepada Pesuruhjaya Tanah Hakmilik Daerah untuk ditentukan ('perintah 1995'). Tiada rayuan dibuat oleh mana-mana pihak terhadap perintah 1995. Sebaliknya, timbalan pengarah mematuhi perintah 1995 dan selepas siasatan, memutuskan dan mengukur sempadan Lot 78 mengikut HWM ('keputusan kedua'). Ia mengakibatkan tanah yang dipertikaikan'menjadi sebahagian daripada Lot 78. Sementara itu, defendan pertama yang terus menduduki tanah yang dituntut balik memohon untuk pemindahan sebahagian tanah yang dituntut balik. Defendan pertama bertanya mengenai status tanah yang dipertikaikan dan ia telah dijawab oleh pegawai Pengarah Tanah dan Galian Negeri Pulau Pinang ('defendan ketiga') bahawa keputusan pertama adalah keputusan yang betul dan bukan keputusan kedua. Dalam tuntutannya, plaintif memohon pelbagai perisytiharan dan perintah, antara lain, bahawa keputusan kedua harus dipatuhi oleh defendan dan defendan pertama untuk mengosongkan tanah yang dipertikaikan. Pesuruhjaya kehakiman yang bijaksana berpendapat bahawa: (a) perintah 1995 adalah perintah yang sah daripada Mahkamah Tinggi, dan keputusan kedua keputusan Timbalan Pengarah Hakmilik Tanah adalah keputusan yang baik; dan (b) keputusan kedua adalah muktamad dan konklusif dan ia menggantikan keputusan pertama. Dua rayuan berasingan dibuat di hadapan Mahkamah Rayuan atas keputusan Mahkamah Tinggi. Satu oleh defendan pertama dan satu lagi oleh defendan kedua dan ketiga. Mahkamah Rayuan membenarkan rayuan terhadap plaintif dan mengetepikan keputusan Mahkamah Tinggi. Oleh itu, kedua-dua rayuan oleh plaintif.

Diputuskan, membenarkan rayuan plaintif, mengetepikan perintah Mahkamah Rayuan dan mengesahkan perintah Mahkamah Tinggi:

(1) Defendan mempunyai beban untuk membuktikan rayuan di hadapan Mahkamah Tinggi bukan mengenai undang-undang tetapi hanya pada fakta. Hakim bicara yang bijaksana adalah betul dalam mengenakan beban kepada defendan untuk membuktikan bahawa rayuan itu dibawa secara salah oleh plaintif. Ia adalah penemuan daripada Mahkamah Tinggi bahawa defendan gagal memberikan bukti sebagai sokongan terhadap pertikaian mereka. Kesimpulan Mahkamah Rayuan bahawa ia dibuat atas pertanyaan fakta tidak disokong oleh bukti keterangan (lihat perenggan 29).

(2) Seksyen 19 Akta bukan merupakan klausa pengecualian, sebaliknya ia memberikan Mahkamah Tinggi dengan bidang kuasa rayuan. Kesilapan fakta atau undang-undang, paling teruk hanya bersamaan dengan penggunaan kuasa yang salah. Oleh itu, ia bukan satu kes di mana Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mendengar apa-apa rayuan. Mahkamah Tinggi tidak dapat dihalang daripada mengeluarkan perintah 1995. Bidang kuasa sedia ada mungkin tidak dikecualikan oleh undang-undang. Jauh daripada tidak termasuk mana-mana bidang kuasa, s 19 Akta pada dasarnya memberi kuasa rayuan untuk dibuat, walaupun mengenai persoalan undang-undang. Oleh itu, dengan bidang kuasa sedia ada, perintah 1995 dikeluarkan secara sah (lihat perenggan 33 & 40).

(3) Mahkamah Tinggi jelas tidak melanggar mana-mana undang-undang dan tidak melebihi bidang kuasa dalam mengeluarkan perintah 1995. Justeru, perintah 1995 itu bukanlah suatu pembatalan. Akibatnya, keputusan kedua adalah sah dan boleh dikuatkuasakan (lihat perenggan 51).

(4) Defendan tidak boleh dibenarkan untuk mempertikaikan perintah 1995. Defendan duduk di perintah 1995 yang mereka anggap sebagai pembatalan selama 15 tahun, hanya untuk membangkitkannya sebagai pembelaan untuk tindakan pencerobohan. Jika ini dibenarkan, benteng akan dibuka kepada litigasi yang tidak berkesudahan (lihat perenggan 58).]

Cases referred to

Awangku Dewa bin Pgn Momin & Ors v Superintendent of Lands and Surveys, Limbang Division [2015] 3 MLJ 161, CA (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Chain Cycle Sdn Bhd v Kerajaan Malaysia [2016] 1 MLJ 681, CA (refd)

Damai Jaya Realty Sdn Bhd v Pendaftar Hakmilik Tanah, Selangor [2015] 2 MLJ 768, CA (refd)

Eu Finance Berhad v Lim Yoke Foo [1982] 2 MLJ 37, FC (refd)

Hadkinson v Hadkinson [1952] 2 All ER 567, CA (refd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143, FC (refd)
Hup Soon Omnibus Co Sdn Bhd & Anor v Lim Chee @ Lam Kum Chee [2017] MLJU 1937, CA (refd)
Isaacs v Robertson [1984] 3 All ER 140, PC (refd)
Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761, FC (refd)
Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener) [2019] 2 MLJ 137; [2019] 1 CLJ 575, FC (refd)
Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100, SC (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal [1994] 2 MLJ 601, SC (refd)
R v Poplar Borough Council, ex parte London County Council (No 2); R v Same, ex parte Managers of Metropolitan Asylums Board (No 2) [1921] All ER Rep 437; [1922] 1 KB 95, CA (refd)
Scotch Leasing Sdn Bhd (in receivership) v Chee Pok Choy & Ors [1997] 2 MLJ 105, SC (refd)
Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 6 CLJ 673, FC (refd)
Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd [2013] 1 MLJ 461, FC (refd)
TO Thomas v Asia Fishing Industry Pte Ltd [1977] 1 MLJ 151, FC (refd)
TRA Mining (M) Sdn Bhd v Thien Hong Teck & Ors and another appeal [2019] 1 MLJ 212, FC (refd)
Tan Sri Dr Muhammad Shafee Abdullah v Tommy Thomas & Ors [2018] 12 MLJ 98; [2018] 1 LNS 1465, CA (refd)
Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd [2017] 1 MLJ 689; [2016] 8 CLJ 163, FC (distd)
Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram [1998] 4 MLJ 297, CA (refd)
Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217, SC (refd)

Legislation referred to

Arbitration Act 2005 s 42
Companies (Winding-Up) Rules 1972 r 5(1)(a)
Companies Act 1965 s 314
Courts of Judicature Act 1964 s 78
Electricity Supply Act 1990 s 16(2)
Federal Constitution art 121
Malay Reservations Enactment (FMS Cap 142)
National Land Code s 263
National Land Code (Penang and Malacca Titles) Act 1963 ss 15, 19, 19(1),

21, 27(3), 28(1), (3), 30(3)
Rules of Court 2012 O 14A, O 33 rr 2, 5

Appeal from: Civil Appeal Nos P-01(A)-372–09 of 2016 and P-02(IM)-1649–09 of 2016 (Court of Appeal, Putrajaya)

Lim Chee Wee (Kwan Will Sen, Nimalan Devaraja and Kelvin Seah Khye Jie with him) (Skrine) for the appellant in Appeal No 01(f)-3–02 of 2018(P).
Lim Chee Wee (Kwan Will Sen, Nimalan Devaraja and Kelvin Seah Khye Jie with him) (Skrine) for the appellant in Appeal No 01(f)-5–02 of 2018(P).
Cyrus Das (Karin Lim Ai Ching, Dominic Pillai a/l RK Pillai, Charanjit Singh a/l Mahinder Singh, Noor Adzraii bin Noor Azhar and Siti Fatimah Talib with him) (Presgave and Matthews) for the respondent in Appeal No 01(f)-3–02 of 2018(P).
Steven Thiru (David Mathew and Hadi Mukhlis with him) (Steven Thiru & Sudhar) for the respondent in Appeal No 01(f)-5–02 of 2018(P).

Rohana Yusuf FCJ (delivering judgment of the court):

INTRODUCTION

[1] The two appeals before us, relate to the issue on the sanctity and validity of an order of the High Court at Pulau Pinang made in 1995 ('the 1995 order'). The order was perfected and not appealed against or set aside. The order was challenged on the basis that, it was made in excess of jurisdiction, hence liable to be set aside. This challenge was brought upon as a defence to a trespass suit filed about ten years after the order was made. The High Court had allowed the trespass suit and dismissed the challenge made on the 1995 order, but it was reversed by the Court of Appeal.

[2] The appeals emanate from a claim of trespass filed by the plaintiff Ann Joo Steel Bhd on 22 April 2010, against Tenaga Nasional Bhd as the first defendant, Pengarah Tanah dan Galian Negeri Pulau Pinang, the second defendant and Mohd Noor bin Rejab, the officer of Pengarah Tanah dan Galian Negeri Pulau Pinang, the third defendant.

[3] For convenience, we will refer the parties in this judgment as they were referred to in the High Court.

THE BACKGROUND

[4] The background facts to these appeals begin with an application by the predecessor in title of the first defendant, Lembaga Letrik Negara ('LLN') in the year 1962, to reclaim 48 acres of land from the sea ('the reclaimed land'). The State Government of Penang allowed the application of LLN. The land

A was reclaimed for constructing Prai Power Station which was completed in 1967. LLN and later the first defendant had occupied the reclaimed land pursuant to a temporary occupation license ('TOL') which had been renewed annually between the years, 1961–2001.

B **[5]** The reclaimed land is adjacent to Lot 78 Seberang Perai Tengah, Bandar Perai, Pulau Pinang (Lot 78). Lot 78 then belonged to Prye (Penang) Syndicate Limited (Prye). The plaintiff (formerly known as Malayawata Steel Limited) purchased Lot 78 from Prye. On 10 December 1970, the Collector of Land Revenue Butterworth had determined and set out the boundary of Lot 78 in C Plan No 544, in accordance with traverse mark. According to the plaintiff, the traverse mark ('TM') method had resulted in a loss of land area of the plaintiff as opposed to measurement following high water mark ('HWM'). The plaintiff claimed it would obtain an additional estimated area of 7.5 acres ('the disputed D land') if HMW method is to be employed. Since TM was used, this part of the land remained as state land.

[6] Dissatisfied with the collector's decision, on 12 March 1971 the plaintiff applied to the Director of Land Titles, pursuant to ss 28(1) and 30(3) of the E National Land Code (Penang and Malacca Titles) Act 1963 [Act 518] to redetermine the measurement of Lot 78. On 22 July 1985, the Deputy Director of Titles, Pulau Pinang ('the deputy director') affirmed the decision of the collector ('the first decision'). The plaintiff then appealed to the Land Titles Appeal Board ('the appeal board'), under s 15 of Act 518. It was dismissed, on F the basis that the first decision was a final decision under ss 27(3) and 28(3) thus not appealable under s 15 of Act 518. The plaintiff then filed an appeal against the decision of the Appeal Board to the High Court pursuant to s 19(1) of Act 518.

G **[7]** The High Court heard the plaintiff's appeal and issued the 1995 order on 22 September 1995. By that order, the High Court remitted the matter to the District Commissioner of Land Titles (*Pesuruhjaya Hakmilik Tanah Daerah*) for it to be determined in accordance with the law. No appeal was lodged by any of the parties against the 1995 order. Instead, the deputy director H complied with that order and proceeded to conduct an enquiry. On 16 April 1998, he decided and measured the boundary of Lot 78 in accordance with HWM ('the second decision'). It resulted in the disputed land forming part of Lot 78.

I **[8]** Meanwhile, the first defendant continued to occupy the reclaimed land, including the disputed land under the TOL. On 30 August 1999, the first defendant applied for alienation of a portion of the reclaimed land (excluding the disputed area). On 27 August 2004 the first defendant was issued with a document of title for the portion of the reclaimed land, now known as PT 10.

[9] The first defendant in a letter dated 1 April 2005 queried on the status of the disputed land. It was responded by the third defendant on 19 April 2005, to say that the first decision was the correct decision and not the second decision. Thereafter on 14 November 2005, the first defendant applied to the state authority for alienation of the disputed land. It was approved subject to payment of a premium of RM5,647,822. The first defendant duly paid the said premium on 14 May 2007.

[10] In its claim, the plaintiff sought for various declarations and orders. In essence, the plaintiff maintained that the second decision would have to be complied by the defendants. The plaintiff also sought orders for the first defendant to vacate the disputed land, and claimed for loss and damages suffered, resulting from the alleged wrongful occupation.

[11] The trespass suit did not proceed to a trial. By consent of parties, it was resolved by way of an application by the plaintiff (in encl 51) pursuant to O 14A and O 33 rr 2 and 5 of the Rules of Court 2012. The following questions were set out for the determination in that application:

1. Whether the decision of the Deputy Director of Land Titles, Penang dated 16.04.1998 ('2nd Decision') is final and conclusive with respect to the area of Lot No 78, Seberang Perai Tengah, Bandar Prai, Pulau Pinang ('the Land') and the boundary of the Land to be measured based on High Water Mark ('HWM');

2. Whether the 2nd Decision prevails over and/or supersedes the decision of the Deputy Director of Land Titles, Penang dated 10.12.1970 and/or 22.07.1985 ('1st Decision') that the boundary of the Land is measured based on Traverse Mark ('TM');

3. If the questions (1) and (2) above are answered in the affirmative:

    a) Whether the plaintiff is the legal, beneficial and registered owner of the Land which includes the area measured based on HWM;

    b) Whether the purported Temporary Occupational Licenses issued by the 2nd Defendant to the 1st Defendant are null and void;

    c) Whether the 1st Defendant is liable for trespass on the Land;

    d) Whether the 1st Defendant ought to vacate that part of the Land which is being trespassed on and to repair and/or restore the said part of the Land to its original condition prior to the trespass;

    e) Whether the 2nd Defendant is to amend the Register of Titles and/or take all necessary steps to reflect that the Land is measured based on HWM as shown in Plan No 544; and

    f) Whether the Defendants are liable for losses and damages (to be assessed) suffered by the plaintiff.

[12] The High Court allowed encl 51 against all the defendants. The learned judicial commissioner ('JC') answered questions 1–3 above in favour of the plaintiff. In gist, the learned JC held that the 1995 order is a valid order of the High Court, and ipso facto the second decision of the deputy director of land titles is a good decision. His Lordship further found that the defendants had failed to substantiate their claim to impugn the 1995 order on the basis that it was an appeal on the point of facts, not law as envisaged by s 19.

[13] On the argument that had the 1995 order been made on questions of law it should be remitted to the board and not the director, the learned JC applied s 21 of Act 518. The learned JC then held that the second decision was final and conclusive and it had indeed superseded the first decision. The effect of which, the disputed land forms part of the land of the plaintiff.

[14] Two separate appeals were lodged before the Court of Appeal on the decision of the High Court. One by the first defendant and the other by the second and the third defendants.

IN THE COURT OF APPEAL

[15] The Court of Appeal allowed both the appeals. The Court of Appeal impugned the 1995 order, applying the principle of law in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. The Court of Appeal held that since the first decision was a decision on border dispute, it was a final decision under s 27(3) of Act 518.

Therefore, there could not be any appeal to the Appeal Board pursuant to s 15. Hence there was no competent appeal before the board to enable further appeal to the High Court under s 19(1). Consequently, the Court of Appeal held that the 1995 order was null and void. Concerning ss 19 and 21, the Court of Appeal in its grounds of judgment stated as follows:

> [65] With respect, we disagreed with the learned JC. Firstly, in our judgment, s 21 is not applicable to the facts of the instant case. As set out above, s 21 empowers the Director or the Board to *vary* or set aside its own decision on the grounds stipulated under paras (a)–(d). It is a power that is exercisable at the instance of the Director and the Board. The order of the High Court dated 22 September 1995 and the remittance by the High Court for the matter to be re-determined by the Commissioner does not fall under any of the circumstances enumerated under paras (a)–(d) of s 21 of the Act.
>
> [66] Secondly, as regards to s 19(1), it must be emphasised that the provision speaks of appeal from the decision of the Board. There must, at the outset be a competent appeal under s 15 before the Board on which the Board made its decision. Against the decision of the Board made pursuant to s 16(b), an appeal shall then lie to the High Court on points of law pursuant to s 19(1). Since s 15 excludes appeals from

the decision of the Director on the determination of boundaries, there can be no appeal to, and no decision of the Board. If there was no decision of the Board, the issue of an appeal to the High Court on a point of law from the decision of the Board (insofar as an appeal is excluded by s 15), did not arise.

[67] The learned JC relied on the words 'selaras dengan undang-undang' contained in order dated 22 September 1995 to hold that the appeal before the High Court must be on a point of law. In our view the wordings 'selaras dengan undang-undang' per se were not conclusive that the appeal before the High Court was on points of law.

[16] The Court of Appeal also observed that had there been any point of law that was before the High Court, it ought to have been remitted to the board to be rectified. The 1995 order instead, ordered the commissioner and not the board to re-determine the boundary. As such, it was held that the 1995 order could not support the plaintiff's case that the appeal to the High Court was brought on points of law from the decision of the Appeal Board, as envisaged by s 19.

[17] Following from these findings, the Court of Appeal allowed the appeal against the plaintiff and set aside the decision of the High Court. The first decision was therefore upheld as legally effective and the second decision was found to be a nullity in law.

[18] Arising from the decision of the Court of Appeal, there are two appeals filed by the plaintiff. Civil Appeal No 01(f)-3–02 of 2018 is against the second and the third defendants and Civil Appeal No 02(f)-5–02 of 2018 is against the first defendant. The appeals are lodged upon obtaining leave to answer three questions of law. We begin with the first question.

[19] *Question 1*:

Whether a party seeking to collaterally attack/challenge a sealed and perfected court order is required to take an active step in filing an application (either in the same proceedings or in separate proceedings brought for that purpose) to set aside the court order, in circumstances where that party failed to appeal.

As it is clear from the question postulated above, the plaintiff in its appeals raised issues on both the substantive law as well the legal procedure employed in the determination of illegality of the 1995 order. Thus the main issue that lies at the heart of these appeals is first, whether the 1995 order is an illegal order made in excess of jurisdiction and liable to be set aside. The next question that follows is whether a party seeking to challenge a sealed and perfected order of the court which has not been appealed upon is required to take an active step

in filing an application either in the same proceedings or in a separate proceeding brought specifically for the purpose of setting aside the court order. To put it in another way, can the defendants challenge the 1995 order, by just raising it in the defence to the trespass suit by the plaintiff.

[20] To recapitulate, the basic premise of the trespass claim by the plaintiff was anchoured on the difference in the measurement of the disputed land. The first defendant was alleged to have continued its occupation on the disputed land against the right of the plaintiff. On top and above that, the first defendant had proceeded to even apply for the alienation of the disputed land. In the midst of these proceedings, the second defendant had in fact alienated the disputed land to the first defendant in direct contradiction of the second decision which was made by its own Deputy Director of Land Titles. The title was however cancelled following contempt proceedings filed by the plaintiff.

[21] The plaintiff's case was that the second decision was validly made in the presence of all parties including, their respective legal counsel. The remittance order in the 1995 order was not challenged and neither was the consequent second decision. Following the second decision, the disputed land was decided to be within the plaintiff's land, hence a case of trespass was made out.

[22] The plaintiff then questioned the procedure adopted by the defendants in posing the challenge on the validity of the 1995 order. It was brought upon by merely raising it as a defence to the claim of trespass by the plaintiff against them. The plaintiff contended that a separate proceeding must be undertaken by the defendants and not through collateral process because that would tantamount to extending the allowable time of appeal of the 1995 order. This was said to be appealing the 1995 order through the backdoor.

[23] Before we move on further, it would appear to us that it is beyond dispute between parties, and it is also an acceptable legal position that any order of the court made in excess of jurisdiction is liable to be set aside. The divergence views in these appeals are first, whether 1995 order is an order made in excess of jurisdiction, and if so, it can be set aside by way of a collateral attack without any other step to challenge the same.

JURISDICTION AND ILLEGALITY

[24] We first deal with the issue on illegality of the 1995 order as found by the Court of Appeal. As earlier stated the Court of Appeal held that the 1995 order was made in excess of jurisdiction. The lack in jurisdiction was reasoned on the basis that the first decision was a final order on border dispute as envisaged by s 27(3), hence not a decision appealable to the board in light of s 15 of the Act. The appeal made by the plaintiff to the board was found

incompetent, and thereby no issue of further appeal under s 19 to the High Court.

[25] Further to that, the Court of Appeal opined that the 1995 order would not be an appeal on questions of law but merely on questions of facts. In concluding so, it was observed in para 66 of its judgment that:

> ... Since s 15 excludes appeals from the decision of the Director on the determination of boundaries, there can be no appeal to, and no decision of the Board. If there was no decision of the Board, the issue of an appeal to the High Court on a point of law from the decision of the Board (insofar as an appeal is excluded by s 15), did not arise.

[26] As contended by the plaintiff, the Court of Appeal had erred in holding that the 1995 order is an order made in excess of jurisdiction. Section 19 it was argued, indeed confers jurisdiction on a High Court to hear appeal albeit on questions of law. It was submitted that the Court of Appeal had wrongly inferred that it was an appeal on questions of facts and not law though the defendants had failed to discharge the burden of proving the same. In doing so, it was contended, the Court of Appeal had arrived at its decision without the defendants discharging the burden imposed on them, in law.

[27] On the issue of burden of proof, it is pertinent to note and analyse the position taken by the respective defendants on the issue of jurisdiction. The first defendant initially took the position that it was not clear whether or not the appeal was brought on the points of law or facts. Also, it was not clear whether the finality provision of Act 518 was canvassed before the High Court. That notwithstanding, the first defendant insisted in its submission before us that, the High Court in Penang had in fact dealt with questions of facts, in the issuance of the 1995 order.

[28] For the second defendant, learned counsel cited the various provisions in the Act to contend that the legislative intent to make the decision on border dispute a finality, was clear. It was further argued that a finality clause must be given effect as decided by this court in *Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd* [2017] 1 MLJ 689; [2016] 8 CLJ 163. In that case, s 16(2) of the Electricity Supply Act 1990 provides that, the decision of the state authority on compensation is final and this court had held that the effect of the finality clause was to prevent appeal and such decision was final. Given the legal position, learned counsel contended, no valid appeal could have been made to the High Court which culminated in the 1995 order.

[29] Having considered the arguments of learned counsel both oral and written, we agree with the plaintiff that adhering to the basic rule on the evidential burden, the defendants bear the burden of proving that the appeal

before the High Court pursuant to s 19, was not on question of law but merely on facts. The learned trial judge was correct in imposing the burden on the defendants to prove that the appeal was wrongly brought by the plaintiff. It was the findings of the High Court that the defendants had failed to adduce evidence in support of their contentions. The conclusion of the Court of Appeal that it was made on questions of facts was not supported by evidential proof.

[30] It must be borne in mind that all the defendants participated in that appeal proceedings together with their respective counsel. They should have raised their objections there. Moreover, they had accepted that decision as they never appealed on the 1995 order. By not appealing the said order means the defendants accepted the correctness of the decision (see *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461). Despite not challenging the 1995 order, the first defendant merely ignored that second decision. Likewise, the second and the third defendants too having failed to appeal on the 1995 order, and having complied with the same, then chose to question back what was in fact, their own decision.

[31] It is patently clear that when the second decision was made, the third defendant was merely complying with the 1995 order. Ironically the third defendant had now to stand on his own for doing so as the second defendant sought to question that second decision, which was made by his own office.

[32] Evidentially, the position taken by the defendants as to whether the appeal was brought on facts or law is neither here nor there. What we have is the 1995 order which is, in essence, a remittance order. On the face of it, it is a clear remittance order for the matter to be decided in accordance with law. Though the Court of Appeal viewed the nature of the 1995 order which says '... untuk menentukan perkara yang sama selaras dengan undang-undang' asperse, not conclusive that the appeal was on points of law, with respect we are of the view that an order for the matter to be decided in accordance with law, implies that the decision before the court was not in compliance with the law in the first place. Though by tracing through the various clauses that we have earlier alluded to, may suggest that there was to be no appeal on border dispute as envisaged by s 27(3), it must be noted that s 19 indeed confers the appellate jurisdiction on the High Court. Hence it cannot be said that the High Court is not seised with jurisdiction at all, to hear the appeal. We say so for the following reasons.

JURISDICTION UNDER S 19

[33] Our first reason is that, even if the Penang High Court had been wrong to treat the appeal before it, as an appeal on the point of law, it is merely an error

of fact or law. In our view and with respect, s 19 is not an exclusion clause, instead it confers the High Court with appellate jurisdiction. An error of fact or law, at worst is only equivalent to a wrongful exercise of power. Viewed in this context therefore, it is not a case where the High Court lacks jurisdiction to hear any appeal.

[34] On this point and in the context of an industrial court dispute, it is useful to note the following observation by learned author V Anantaraman, when he said:

> A mere error of law is an error within the jurisdiction of the industrial court, and invariably arises out of misinterpretation of the provisions of the industrial law applicable to the dispute inquired into by the Industrial Court. Specifically, once the Industrial Court has jurisdiction to hear and decide the dispute on its merits, and in the process of applying the specific provision of the industrial law relevant to the dispute, the Industrial Court misinterprets that statutory provision, such a misinterpretation is deemed to be a mere error of law. To put it differently, the Industrial Court did not exceed its jurisdiction but only misinterpreted the law. The reviewing court cannot hold such decisions of the Industrial Court ultra vires of that statutory provision and therefore null and void (see V Anantaraman, *Judicial Review: The Malaysian Experience (II)* [1994] 1 MLJ lxv).

[35] As an aggrieved party, the plaintiff had the right of recourse to file an appeal against the decision of the board for the court's determination. In this regard, we take into consideration the approach taken by the court in applying and construing the provision of similar nature. One such instance would be s 42 of the Arbitration Act 2005. Section 42 says:

> Any party may refer to the High Court any question of law arising out of an award.

[36] Analogous to s 19, s 42 of the Arbitration Act (now repealed) clothes the court with the statutory jurisdiction to hear a challenge against an arbitral award on point of law. The approach taken by the court in dealing with s 42 application is to first, determine whether it is a question of facts or question of law. In the event the court determines that it is a question of law, the court then will proceed to hear the application (see *Awangku Dewa bin Pgn Momin & Ors v Superintendent of Lands and Surveys, Limbang Division* [2015] 3 MLJ 161).

[37] The Court of Appeal in *Chain Cycle Sdn Bhd v Kerajaan Malaysia* [2016] 1 MLJ 681, set aside the order of the High Court made under s 42 of the Arbitration Act 2005 on the basis that the determination of damages was a determination of fact and not law. It was held as a wrong order by the Court of Appeal. Thus, it is not a case of excess of jurisdiction when a case is brought on issues of fact and not law as required under s 42. Such wrong order is liable to be overruled on appeal.

[38] The reverse would also be true. If the Penang High Court had wrongfully answered a question of facts in the belief that it was answering a question of law in issuing the 1995 order, it would not mean that it had acted in excess of jurisdiction. All it means is that the Penang High Court was wrong in failing to appreciate that the point of law determined, was a question of fact. And the recourse available to the defendants is also to take up the 1995 order on appeal.

INHERENT JURISDICTION

[39] Our second reason is the inherent power of the superior court. Central to the issue of jurisdiction, we must not overlook the fact that a superior court has always been endowed with inherent jurisdiction in addition to powers conferred by a Code or a statute. Jurisdiction of the court in Malaysia is derived from art 121 of the Federal Constitution. This includes the power of judicial review and to review the decision of public authorities. It is also well accepted that generally speaking, in the realm of administrative law and in any dispute between a citizen and the state, the superior court has the inherent jurisdiction to rule on constitutionality or legality of all governmental action (see *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135).

[40] As observed by Sir Jack Jacob in his article *The Inherent Jurisdiction of the Court* (1970) Current Legal Problems 23:

> If the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called 'inherent'. This description has been criticised as being 'metaphysical', but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law. The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

With the intrinsic jurisdiction endowed in the court, the High Court cannot be precluded from issuing the 1995 order. An inherent jurisdiction generally speaking, may not be excluded even by statute. Far from excluding any jurisdiction, s 19 in essence empowers appeal to be made, albeit on question of law. Thus if nothing else, at least, by its inherent jurisdiction the 1995 order was legally issued.

NO CLEAR BREACH OF STATUTE

[41] Our next reason is that the 1995 order is not issued in clear breach of a statute. Decided authorities are clear that an order of the court becomes a nullity only when it is made in clear breach of a statute, hence in excess of jurisdiction. A survey on these cases reveals that in all cases of illegality (which had been impugned by the court) of either administrative orders or orders of a court, they are clearly in breach of statutes a fortiori in excess of jurisdiction. Decided authorities are also replete with decisions on the sanctity and the need to observe a binding court order.

[42] In *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37, there were two orders for sale made by the collector of land revenue pursuant to s 263 of the NLC. The first order had erroneously left out eight of the properties involved. Subsequently, another collector made a second order to correct the first order for sale. The plaintiff sought to enforce the second order for sale and was allowed by the High Court. On appeal to the Federal Court, the High Court order was set aside on the basis that the second order by the collector was a nullity under s 263 because it was made functus officio.

[43] In *TRA Mining (M) Sdn Bhd v Thien Hong Teck & Ors and another appeal* [2019] 1 MLJ 212, the winding up order made by the High Court in Malacca was found to be illegal for failure to comply with s 314 of the Companies Act 1965. In *Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener)* [2019] 2 MLJ 137; [2019] 1 CLJ 575 the winding up order made by the senior assistant registrar ('SAR') was found to be null and void, because it was made in excess of jurisdiction since the SAR had no authority to issue a winding up order. The authority to do so is only conferred on a judge in chambers in accordance with r 5(1)(a) of the Companies (Winding-Up) Rules 1972.

[44] In *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, the High Court judge issued an order for sale after hearing parties despite the plea of non est factum, an allegation of fraud and forgery. The order was finalised as there was no further appeal. An application was made by the respondent to set aside the order before the same judge but was refused. The respondent later made another application to set aside the two previous orders on the same grounds. This time the same judge set aside his own order. This court allowed the appeal and held that the learned judge was functus officio hence no jurisdiction to alter or set aside a judgment regularly obtained, after it had been entered and a final order had been drawn up.

[45] This court had in *Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd* [2017] 1 MLJ 689 held that judicial pronouncements have always

A been clear that a court order holds good and is valid until it is set aside. An order of a superior court must be deemed to be valid and must be obeyed until it is set aside in proceedings commenced for the purpose of setting it aside (see *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761 (FC)). The Supreme Court in *Scotch Leasing Sdn Bhd (in receivership) v Chee Pok Choy & Ors* [1997] B 2 MLJ 105, reminded that a superior court like the High Court is a court of unlimited jurisdiction. Quoting Lord Diplock's statement in *Isaacs v Robertson* [1984] 3 All ER 140 the Supreme Court held that it must be obeyed and could only be challenged in a direct application to set it aside.

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[46] The Supreme Court in *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601 opined that an order of a superior court (such as the High Court) even if it is an order obtained ex parte D or a default judgment, requires a plain and unqualified obligation of every person, against or in respect of whom an order is made unless and until the order is discharged. Romer LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567, reasoned for such observation on the basis that a superior court must be presumed to have the jurisdiction to make an order which it has made. Hence E every order made by a superior court must be regarded as an order of competent jurisdiction.

[47] In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd*, the appellants were the registered co-owners of a Malay Reserved Land. The F appellants had charged the land by way of a third party charge to secure a loan advanced to the business associate of the appellants. When there was a breach of the loan agreement, the appellants, inter alia, sought for a declaration that the charge was invalid, for contravening the Malay Reservation Enactment. The High Court granted the declaration but at the same time ordered for the G appellants to repay the loan (the first order). Two years later the same judge made an order that the appellants having received benefits from the respondent ordered for the land to be sold and the proceeds of which to pay the outstanding balance of the loan (the second order). The appellants did not appeal on that second order. They filed proceedings afresh to have the second H order set aside on the ground that it contravened the Malay Reservations Enactment (FMS Cap 142). It was allowed by the High Court because the second order contravened a written law, FMS Cap 142. This court upheld that decision as it was found that the judgment based on the second order was null and void on the ground of illegality or lack of jurisdiction and was rightly set I aside.

[48] It is also worthy of emphasis that even a default judgment is a good and enforceable judgment until it is set aside (see *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100). The default judgment in this case

until set aside was found to be a good and enforceable judgment citing in support *Isaacs v Robertson* where the headnote reads:

> Orders made by a court of unlimited jurisdiction in the course of contentious litigation are either regular or irregular. It is misleading to seek to draw distinctions between orders that are 'void', in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders which are 'voidable', in the sense that they may be enforced until set aside, since any order must be obeyed unless and until it is set aside and there are no orders which are void ipso facto without the need for proceedings to set them aside.

[49] In *TO Thomas v Asia Fishing Industry Pte Ltd* [1977] 1 MLJ 151, it was held by this court that 'An order even irregularly obtained cannot be treated as a nullity, but must be implicitly obeyed, until by proper application it is discharged'. The Court of Appeal in *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [1998] 4 MLJ 297, observed that a party could not ignore or refuse to comply with a court order on the ground of nullity. In another case of *Hup Soon Omnibus Co Sdn Bhd & Anor v Lim Chee @ Lam Kum Chee* [2017] MLJU 1937, the Court of Appeal had once again emphasised that a court order is a court order, it must be obeyed as ordered unless set aside or varied. And it is not a mere technicality that can be ignored.

[50] Again in *Damai Jaya Realty Sdn Bhd v Pendaftar Hakmilik Tanah, Selangor* [2015] 2 MLJ 768 the Court of Appeal held that it was an entrenched principle in our jurisprudence that all orders of court must be obeyed by the relevant parties (unless the order is set aside) citing also *Hadkinson v Hadkinson*. It is also well settled too that the motive for disobedience is irrelevant (*R v Poplar Borough Council, ex parte London County Council (No 2); R v Same, ex parte Managers of Metropolitan Asylums Board (No 2)* [1921] All ER Rep 437; [1922] 1 KB 95). In *Tan Sri Dr Muhammad Shafee Abdullah v Tommy Thomas & Ors* [2018] 12 MLJ 98; [2018] 1 LNS 1465, the Court of Appeal held and found an order on the proceedings be held in camera evidence, is to be observed because it remains valid and binding until it is set aside.

[51] From all the above-cited authorities we find it clear that the cases are in a chorus that a court order is found to be a nullity only if it clearly breaches a statute and hence in excess of jurisdiction. The High Court in issuing the 1995 order was not in clear breach of any statute. If at all, and even if made on questions of facts, it may be a wrong order and not a nullity. For the reasons we have stated we hold that the High Court was not in excess of jurisdiction in issuing the 1995 order. Hence the 1995 order is not a nullity. Consequently, the second decision is therefore, valid and enforceable.

[52] The other legal principle to be derived from all the above cases is that a specific action whether in the same or separate proceeding is required to set

A aside an enforceable binding order of a court. This then brings us to the issue of collateral attack.

COLLATERAL ATTACK

B **[53]** On the issue of collateral attack, the High Court held that the 1995 order is a court order, and it cannot be challenged in a collateral proceeding. The defendants cannot impugn its validity laterally without first applying for it to be set aside. The learned JC held that the defendants could not now dispute the jurisdiction of the High Court, which in effect tantamount to a backdoor C attempt to challenge a binding order in order to defeat the plaintiff's claim for trespass. This issue was not dealt with by the Court of Appeal in its grounds of judgment.

D **[54]** For the defendants, the position taken by them being that the 1995 order and the second decision was a nullity and may be ignored, and disregarded, despite taking no step to first set it aside. Learned counsel for the defendants cited to us the decision of this court in *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1; [2013] 6 CLJ 673 to contend that E an order of a court may be impugned if made in contravention of a statute.

[55] We have examined the decision in *Serac Asia*. In that case, an application was made to strike out a court order for being illegal or excess of jurisdiction. The application was made in the same proceedings. At para 35 of F the judgment Abdul Hamid FCJ referred and summarised the decision of *Badiaddin* that where an order of the court was obtained in a manner which contravenes a statute, resulting in an order being illegal, the court has the inherent jurisdiction to strike it out ex debito justitia. However, it is to be noted that in *Serac Asia* too, a separate application was made to strike out the G impugned order.

[56] Back to the instant appeals, from the year 1995 the second defendant had never informed the plaintiff that the second decision that was made by them was wrong or to be ignored on the basis that the 1995 order was a nullity H and that the Deputy Director of Lands Titles had acted in excess of jurisdiction in arriving at the second decision. The plaintiff was made aware of the position taken by the second and the third defendants.

I **[57]** It is indeed beyond comprehension that the position taken by the second defendant on the second decision is a total disavowal of the decision made by its own Deputy Director of Land Titles. We find it rather perplexing, when the second decision made obviously by an officer of the second defendant, who had acted on the 1995 order became a dispute by his same office. The second defendant rightly should support its own decision or at the

very least took a neutral stand. It is difficult in the circumstances, to appreciate any good reason for the second defendant to take up such a stand. This itself may attract some other legal complications, which we find it unnecessary to deliberate upon, since parties do not raise it as an issue.

[58] Now, even if the 1995 order is a nullity in our view, the defendants should not be allowed to impugn the 1995 order, in the way that they did. The list of authorities above is clear on the procedure to be adopted. The defendants sat on the 1995 order which they believed to be a nullity for a span of 15 over years, only to raise it as a defence to an action of trespass. If this is allowed, it will lead to serious implications. The effect of which, floodgates will be opened to a never-ending litigation. It certainly removes the valued certainty that court's process provides. Besides, it allows a backdoor way of appealing on a decision of the court, way out of the given time under the law.

[59] It cannot be opened to any person to decide upon himself whether an order of a court which binds him is wrongly issued and does not require his obedience. Until such time it is set aside or varied the order of court is entitled to the obedience and respect from all parties. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences (see *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217).

[60] It must be borne in mind that, there is a legal presumption that an order of a court is validly made, unless it was obtained by fraud, etc. It bears repeating that the 1995 order was made by the High Court with unqualified participation of all relevant parties. The parties were also represented by their respective counsel as disclosed in the 1995 order itself. A court order regularly made cannot be ignored on the belief of a party that it is a nullity. Any such attempt would militate against the basic legal position as pronounced in the various earlier cases on the subject, that a regularly made order of court must be observed at all costs.

[61] The Court of Appeal had not advanced this procedural issue in its grounds of judgment. It was argued by learned plaintiff's counsel that the failure of the Court of Appeal to act and decide as enunciated in the earlier cases by this court, on the face of record is bad under the Federal Constitution, as it compromises the authority and jurisdiction of the court. It would also pave the way and stand as a precedent for relevant parties to breach an order of the court. This would lead to a chaotic situation and would compromise judicial authority.

[62] In relying on the decision of this court in *Badiaddin*, the Court of Appeal failed to note that, even in *Badiaddin* itself, there was a fresh proceeding

A filed to set aside the relevant court order therein. *Badiaddin* is therefore not an authority to suggest that an order which is illegal may be impugned in a collateral proceeding as done in the instant appeal. As explained by Peh Swee Chin FCJ in that case:

B > When a judgment in the High Court has been perfected ... a party to the judgment generally and subject to the same passage, or any other written law, and apart from any appeal, cannot reopen the matter finalised in the judgment by seeking to alter it or amend it for the court would be functus officio by virtue of the ratio of *Hock Hua Bank Bhd v Shahari bin Murid.*

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Besides the above observation, Peh Swee Chin FCJ went on to state that:

> Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited civil jurisdiction in the course of contentious litigation.

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[63] The above observation was made on the basis that a superior court is not an inferior court or statutory tribunal (such as a land administrator under the National Land Code 1965 as in *Eu Finance Berhad v Lim Yoke Foo* [1982] 2 MLJ 37). Then His Lordship went on to add that:

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> It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside on valid grounds, but without doing so, one cannot attack its invalidity laterally by *raising an objection to its invalidity in any other proceedings, without filling proceedings for applying to have it set aside first.* When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action on any ground other than those mentioned in the quoted passage from *Hock Hua Bank Bhd v Sahari bin Murid* ... (Emphasis added.)

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[64] In the judgment of Mohd Azmi Kamaruddin FCJ in *Badiaddin* His Lordship observed that a person affected by the order is entitled to apply to have it set aside. Gopal Sri Ram JCA in the same case echoed similar observation where in the words of His Lordship:

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> I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside *in proceedings brought for that purpose.* It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. (Emphasis added.)

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[65] The fundamental principle which is pivotal in all these decisions, is that the sanctity of a court order must at all times be observed, and a party bound by that order of a court has no business deciding for himself that a binding order of a court need not be observed because in his view it is not valid. If court orders are allowed to be ignored with impunity, it will ruin the authority of judicial order, which is the core of all judicial systems. In line with our jurisprudence, court orders must be respected and complied with. There will be no end to litigation if parties are allowed to determine for themselves that any order of the court would be observed or otherwise.

[66] It is, therefore, a long established principle of law that one may apply to set aside an order of a superior court but it must be made in a direct and specific proceeding filed for that purpose be it in the same proceedings or a separate one. It cannot be contested merely by raising it as defences in a suit as being undertaken in these appeals. The underlying reason for this legal jurisprudence to be adhered to, is not difficult to appreciate. It is to preserve the sanctity as well the finality of an order of court. We therefore do not find any reason to depart from all these earlier decisions on this particular point.

[67] From the above discussions, we are clear in our minds that, question 1 posed must be answered in the affirmative.

[68] The next question which was allowed in the leave application is question 2, which is phrased as below:

Whether the principle enunciated in the Federal Court case of Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd [2017] 1 MLJ 689 *that an administrative body/tribunal/decision-maker was not entitled to review its previous decision can be extended to circumstances where the administrative decision-maker had reviewed its previous decision upon the remittance of the matter back to it to be re-determined, acting in compliance with a sealed and perfected court order*.

[69] The above question centres on the decision of this court in *Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd.* It was cited by the defendants in support of the finality clause. In that case, the relevant issue was whether an administrative tribunal could review its own decision despite the finality clause. It is different in the present appeals. The administrative body in the present appeals issued the second decision, in adherence to the 1995 order of the High Court.

[70] Our perusal of the grounds of judgment in both the courts below reveals that the issue as posed in question 2 above is not the issue that determined the decision made by the Court of Appeal. The High Court, however, did touch upon the matter briefly to support its judicial finding that

a court order holds good and valid till set aside. In any event, *Tenaga Nasional Bhd v Bandar Nusajaya Development Sdn Bhd* dealt with a different factual scenario and is not relevant to the facts of the instant appeals.

[71] Question 3 was granted leave in furtherance of question 2 where it says, further to question 2, is the aforementioned decision arrived at by the administrative body/tribunal/decision-maker still susceptible to a collateral attack on the grounds of excess of jurisdiction or nullity. Looking at both these questions, we agree with learned counsel that they are not issues which would determine the outcome of the appeals before us. We are minded not to deliberate on the same, and we decline to answer both these question 2 and question 3.

[72] As the answer to question 1 is in the affirmative. We unanimously allow the appeals of the plaintiff with costs. We set aside the order of the Court of Appeal and affirm the decision and orders made by the High Court pursuant to the application of the plaintiff in encl 51.

[73] This judgment is prepared pursuant to s 78 of the Courts of Judicature Act 1964, as the Chief Judge of Malaya, Zaharah Ibrahim and Balia Yusof Wahi FCJ, had since retired.

Appeal allowed, order of Court of Appeal set aside and order of High Court affirmed.

Reported by Ahmad Ismail Illman Mohd Razali